

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Rachel Ellman	Team: Squad #13	CCRB Case #: 201603160	<input checked="" type="checkbox"/> Force	<input checked="" type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Monday, 04/04/2016 5:30 PM	Location of Incident: [REDACTED]	Precinct: 73	18 Mo. SOL 10/4/2017	EO SOL 10/4/2017	
Date/Time CV Reported Wed, 04/13/2016 10:32 AM	CV Reported At: CCRB	How CV Reported: On-line website	Date/Time Received at CCRB Wed, 04/13/2016 10:32 AM		

Complainant/Victim	Type	Home Address
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

Subject Officer(s)	Shield	TaxID	Command
1. SGT Daniel Nicoletti	5379	942271	GVS DIV
2. DT3 James Walsh	01303	935947	GVS DIV
3. DT3 Gerald Cucchiara	3472	938303	GVSD Z1

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. DT2 Joebian Ortiz	02131	919519	GVS DIV

Officer(s)	Allegation	Investigator Recommendation
A.DT3 James Walsh	Force: Det. James Walsh pointed his gun at § 87(2)(b) and § 87(2)(b)	[REDACTED]
B.DT3 Gerald Cucchiara	Force: Det. Gerald Cucchiara pointed his gun at § 87(2)(b) and § 87(2)(b)	[REDACTED]
C.SGT Daniel Nicoletti	Force: Sgt. Daniel Nicoletti pointed his gun at § 87(2)(b) and § 87(2)(b)	[REDACTED]
D.DT3 James Walsh	Abuse: Det. James Walsh damaged § 87(2)(b)'s property.	[REDACTED]
E.DT3 James Walsh	Force: Det. James Walsh used physical force against § 87(2)(b)	[REDACTED]
F.DT3 Gerald Cucchiara	Force: Det. Gerald Cucchiara used physical force against § 87(2)(b)	[REDACTED]
G.DT3 James Walsh	Discourtesy: Det. James Walsh spoke discourteously to § 87(2)(b) and § 87(2)(b)	[REDACTED]
H.DT3 Gerald Cucchiara	Discourtesy: Det. Gerald Cucchiara spoke discourteously to § 87(2)(b) and § 87(2)(b)	[REDACTED]
I.SGT Daniel Nicoletti	Discourtesy: Sgt. Daniel Nicoletti spoke discourteously to § 87(2)(b) and an individual.	[REDACTED]

Case Summary

On April 13, 2016, § 87(2)(b) filed this complaint on the CCRB website on behalf of her son, § 87(2)(b) and his friend, § 87(2)(b)

On April 4, 2016, shortly before 5:30 p.m., § 87(2)(b) rode through the Brownsville neighborhood in Brooklyn as a passenger in § 87(2)(b)'s black BMW sedan. The vehicle was without a front license plate, and was witnessed by Det. Joebian Ortiz, of the Gun Violence Suppression Division, driving recklessly, including speeding and making an improper turn. Det. Ortiz activated the lights and sirens of his unmarked vehicle in an attempt to conduct a car stop on § 87(2)(b)'s car, yet the vehicle escaped. (Board Review 15) Det. Ortiz alerted Det. James Walsh, Sgt. Daniel Nicoletti, and Det. Gerald Cucchiara, all also of the Gun Violence Suppression Division and at the time in an unmarked vehicle together, via point-to-point communication, that a black BMW without a front license plate had evaded a car stop; no other information was conveyed to the officers at that time.

Shortly thereafter, Det. Walsh, who was the operator of this second vehicle, saw the black BMW approaching from the opposite direction of traffic. Det. Walsh activated his lights and sirens and attempted to stop the BMW, which then turned onto a one-way street into oncoming traffic. Det. Walsh's vehicle followed, and then turned with the BMW onto Thomas Boyland Avenue. Dense traffic near the intersection of Thomas Boyland Avenue and Atlantic Avenue caused the BMW to slow, at which point Det. Cucchiara and Sgt. Nicoletti approached the vehicle with guns drawn, with Det. Walsh approaching with his gun drawn moments after (**Allegations A, B, C**); during their approach, Det. Walsh and Det. Cucchiara repeatedly directed profanities at § 87(2)(b) and § 87(2)(b) (**Allegations G, H**). Upon arrival at the vehicle, Det. Walsh near immediately used the butt of his gun to break the driver's side window (**Allegation D**), at which point he reached his hand inside the car and opened it from the inside. § 87(2)(b) was pulled from the vehicle by Det. Walsh and Det. Cucchiara (**Allegations E, F**) and handcuffed shortly thereafter, while § 87(2)(b) fled north. Sgt. Nicoletti pursued § 87(2)(b) and directed profanities both at him and at a bystander (**Allegations I, J**). § 87(2)(b) was ultimately apprehended by backup officers on Herkimer Street, one block away. (Board Review 19)

§ 87(2)(b) and § 87(2)(b) were arrested, and initially were both charged with assault of a police officer (PL 120.05A 03), possession of a loaded firearm (PL 265.03 01B), reckless endangerment (PL 120.25), resisting arrest, (PL 205.30), and speeding (VTL 1180 0B). § 87(2)(b)'s charges were later reduced to trespassing of a residence on § 87(2)(b). (PL 140.05).

Video Footage

A surveying of businesses in the vicinity of the incident yielded no video footage.

Mediation, Civil, and Criminal Histories

- Due to § 87(2)(b)'s and § 87(2)(b)'s arrests, this case is not suitable for mediation.

- § 87(2)(b), § 87(2)(a) 160.50

§ 87(2)(b), § 87(2)(a) 160.50

§ 87(2)(b)

- As of July 12, 2016, no notice of claim has been filed with the Comptroller's office regarding this incident. (Board Review 03)

Civilian and Officer Histories

- This is the first CCRB complaint involving § 87(2)(b) § 87(2)(b)
§ 87(2)(b)
§ 87(2)(b)
- Sgt. Nicoletti has had allegations of misconduct filed against him in four other CCRB cases in his nine year tenure with the NYPD, totaling seven allegations. Though none of these allegations have been substantiated, the majority of claims made against Sgt. Nicoletti involve entrance into a vehicle or home, with one case involving breaking a car window during a vehicle stop. (Board Review 06)
- Det. Cucchiara has had allegations of misconduct filed against him in seven other CCRB cases in his 10 year tenure with the NYPD, totaling 16 allegations. In 2008, allegations against Det. Cucchiara of a stop and frisk were substantiated. The CCRB recommended Det. Cucchiara receive command discipline, yet the NYPD's final disposition was instructions. Det. Cucchiara was alleged to have stopped, frisked and searched a civilian in an additional case, yet no allegations were substantiated. Det. Cucchiara has faced one vehicle search allegation and one home entry allegation. Det. Cucchiara is the subject of one CCRB investigation that is awaiting board disposition. This complaint concerns discourteous actions and words, and no allegations have been recommended to be substantiated against Det. Cucchiara. (Board Review 07)
- Det. Walsh has had allegations of misconduct filed against him in five other CCRB cases in his 12 year tenure with the NYPD, totaling eight allegations. In 2012, a search allegation against Det. Walsh was substantiated by the CCRB and charges were recommended, yet the NYPD has not come to a disposition on the matter; this is the lone allegation substantiated against Det. Walsh. Det. Walsh has been the subject of both the search of individuals and residences, and has faced additional charges regarding discourteous or offensive language; Det. Walsh has no prior allegations of force. (Board Review 08)

Potential Issues

- § 87(2)(b) did not respond to any requests for his participation in the investigation, so civilian statements are limited to § 87(2)(b)'s account.
- § 87(2)(b), § 87(2)(g)
§ 87(2)(b)
§ 87(2)(b)

Allegations not pleaded:

- **Abuse** (Vehicle stop) is not pleaded because both officer testimony and charges incident to arrest document that § 87(2)(b)'s vehicle was without a front license plate, which is a

violation of PL 265.01 (improper display of number plates) and thus probable cause to stop the vehicle. Further, § 87(2)(b) stated that he was speeding, a violation of VTL1180 OB (speed exceeding 55 MPH), which also provides probable cause to stop.

Allegation A—Det. Gerald Cucchiara pointed his gun at § 87(2)(b) and § 87(2)(b)

Allegation B— Det. James Walsh pointed his gun at § 87(2)(b) and § 87(2)(b)

Allegation C—Sgt. Daniel Nicoletti pointed his gun at § 87(2)(b) and § 87(2)(b)

It is undisputed that Det. Cucchiara, Det. Walsh and Sgt. Nicoletti pointed their guns at § 87(2)(b) and § 87(2)(b) § 87(2)(g)

§ 87(2)(b) stated that § 87(2)(b)'s vehicle proceeded lawfully onto Utica Avenue, Eastern Parkway and Atlantic Avenue, and that § 87(2)(b)'s demeanor and driving were calm. After approximately six minutes, the vehicle came to a stop upon reaching a red light at the intersection of Atlantic Avenue and Thomas Boyland Avenue, at which point three individuals exited from a brown Nissan that was stopped directly behind them. Two plainclothes officers approached the driver's side window while the third plainclothes officer approached the passenger's side, and all had firearms pointed inside the vehicle. § 87(2)(b) had not seen the vehicle prior to the individuals' exit, and did not see any flashing lights, hear any sirens, or notice any other indication that it was a police vehicle, nor did he see or hear anything that suggested that they were officers. (Board Review 09)

Det. Ortiz was not present when Det. Walsh, Det. Cucchiara and Sgt. Nicoletti approached § 87(2)(b)'s vehicle. He stated that he did not provide any details of the BMW to Det. Walsh, Det. Cucchiara and Sgt. Nicoletti beyond descriptors of the vehicle and the fact that it had fled and drove recklessly upon Det. Ortiz' attempt to stop it. (Board Review 15)

Det. Walsh stated that he saw § 87(2)(b)'s BMW shortly after receiving a point-to-point communication from Det. Ortiz stating that the car was driving recklessly and had turned onto Rockaway Avenue. The BMW approached the officers from the opposite direction of traffic, and as it grew closer, Det. Walsh witnessed it cross over a double yellow line, an arrestable offense. Det. Walsh then activated the vehicle's lights and sirens to conduct a stop, at which point the BMW turned onto Dean Street, going against traffic on the one-way street. The BMW was stopped by a red light at the intersection of Thomas Boyland Avenue and Atlantic Avenue, which at the time was filled with bumper-to-bumper rush hour traffic. Det. Cucchiara promptly exited the vehicle and approached the BMW with his badge visible and gun pointed inside the car and continuously instructed § 87(2)(b) to turn off the vehicle and make his hands visible. Det. Walsh testified that he also approached the BMW with his gun raised and pointed inside the car soon after, and did so based on the vehicle's noncompliance with Det. Cucchiara's orders, its evasion of Det. Ortiz, and the reckless driving he himself witnessed. (Board Review 11)

Det. Cucchiara testified to the fact that he, Det. Walsh, and Sgt. Nicoletti saw a black BMW driving opposite them minutes after receiving communication from Det. Ortiz of a car matching that description driving recklessly in the vicinity. When a few car lengths away, Det. Cucchiara, who sat in the backseat of his vehicle, witnessed the BMW cross over the double yellow line, at which point lights and sirens were activated to stop the vehicle. The BMW turned so that it was driving against traffic on a one-way street, and Det. Cucchiara's vehicle followed in pursuit. The officers followed to Thomas Boyland Avenue, where the BMW was slowed and eventually stopped by dense traffic. Det. Cucchiara was unable to see inside the vehicle at any point in this pursuit due to window tints he believed to be illegal. As the BMW slowed, Det. Cucchiara exited

the vehicle and approached the BMW with his gun pointed and his badge displayed visibly on his belt while verbally identifying himself as an officer and requesting numerous times for § 87(2)(b) to turn off his car and open his door. (Board Review 12)

Sgt. Nicoletti stated that he received a phone call from Det. Ortiz relaying information of a car that fled during an attempted vehicle stop. Det. Ortiz informed Sgt. Nicoletti that the vehicle was a black BMW, that it was travelling south on Rockaway Avenue, as well as a partial sequence of numbers on its license plate; he did not tell Sgt. Nicoletti why he had attempted to pull the BMW over. Immediately, Sgt. Nicoletti saw this vehicle traveling in the direction opposite his, and Det. Walsh maneuvered the vehicle and turned the lights and sirens on to conduct a stop. The BMW evaded Sgt. Nicoletti's vehicle, and began to travel westward at a high rate of speed on Dean Street, an eastbound street. Sgt. Nicoletti's vehicle followed the BMW onto Dean Street, and then followed after it made a right turn onto Thomas Boyland Avenue. Amidst the chase, Sgt. Nicoletti stated that he was unable to see inside the vehicle due to tints he believed were illegally dark. The BMW was slowed on Thomas Boyland Avenue due to dense vehicular traffic, at which point Sgt. Nicoletti, Det. Walsh and Det. Cucchiara all exited their vehicle and approached the BMW, which was still moving at the time. At this time, the occupants of the vehicle were not suspected of any other crime other than attempting to flee, for which they were considered under arrest, yet Sgt. Nicoletti believed drawn guns were warranted for "safety purposes," noting that a car can be used as a weapon. (Board Review 13)

Per Patrol Guide 221-01, Interim Order 34: The decision to display or draw a firearm should be based on an articulable belief that the potential for serious physical injury is present. (Board Review 14)

§ 87(2)(b), § 87(2)(g)

Allegation D— Det. James Walsh damaged § 87(2)(b)'s property.

Allegation E— Det. James Walsh used force against § 87(2)(b)

Allegation F— Det. Gerald Cucchiara used force against § 87(2)(b)

§ 87(2)(b) stated that three officers approached § 87(2)(b)'s vehicle shouting at § 87(2)(b) and § 87(2)(b) to not move and to open the door of the car and with their guns drawn and pointed inside the car. § 87(2)(b) had no knowledge of who these individuals were or what precisely was happening, and fearing for his safety he ducked and crouched within the vehicle, and stated

that § 87(2)(b) did the same. § 87(2)(b) testified that neither he nor § 87(2)(b) moved around in the car prior to being pulled over. One officer hit the driver's side window of the BMW with the butt of his gun nearly immediately upon approach of the BMW. § 87(2)(b) stated that the officer successfully broke the window on his third attempt, after which he reached inside the vehicle and opened the door from the inside. The officer unbuckled § 87(2)(b) and pulled him out of the vehicle. § 87(2)(b) stated that he believed he was being robbed, and then exited the vehicle of his own volition while pleading with the officers for his safety.

Det. Walsh stated that he exited his vehicle and approached the driver's side of the BMW with his gun drawn and pointed inside. Upon his approach, he heard Det. Cucchiara issue multiple commands for § 87(2)(b) to turn off the vehicle and make his hands visible, to which § 87(2)(b) did not respond. Det. Walsh did not know who was in the BMW or how many people were in it, and had no explicit reason to suspect that there were weapons in the car; at the time, all he could see inside the vehicle was § 87(2)(b) slumped over facing toward the passenger seat. Det. Walsh stated that, per his training, if a suspect does not comply with orders to turn off a vehicle or show their hands, as was the case with § 87(2)(b) it is possible that he has a weapon. As such, believing this situation to be potentially dangerous, Det. Walsh knocked on the driver's window with the butt of his gun until the window broke; Det. Walsh was unsure as to how many times he hit the window in total. He reached into the car, opened it from the inside, pulled § 87(2)(b) out and handed him to Det. Cucchiara to handcuff him.

Det. Cucchiara stated that he clearly identified himself as an NYPD officer, both verbally and with the clear display of his badge on his belt, while approaching § 87(2)(b)'s vehicle. Det. Cucchiara instructed § 87(2)(b) multiple times to turn off his vehicle and to open his door, and in response both § 87(2)(b) and § 87(2)(b) assumed the fetal position in the car. At this time, Sgt. Nicoletti approached the passenger's side of the car, and Det. Walsh approached the driver's side window. Det. Walsh attempted to open the driver's side door, and when it was locked he began to hit the driver's side window to break it open. Det. Walsh eventually broke the window open, reached his hand in, and unlocked the vehicle from the inside; Det. Cucchiara was unsure with what Det. Walsh opened the window, but believed he used his hand. After Det. Walsh opened the door, he and Det. Cucchiara promptly pulled § 87(2)(b) out of the vehicle. Det. Cucchiara placed § 87(2)(b) on the ground and promptly handcuffed him.

Sgt. Nicoletti testified that he did not enter § 87(2)(b)'s vehicle at any point during the incident. While standing outside the passenger's side of the vehicle, he noted that Det. Walsh continuously relayed commands to § 87(2)(b) to turn off the vehicle and lower his window, and made attempts to open § 87(2)(b)'s door from the outside handle. When § 87(2)(b) refused to open the door and Det. Walsh was unable to open it from the exterior, he then broke the driver's side window; Sgt. Nicoletti believed Det. Walsh did so with his hand, yet was unsure.

Per New York State Vehicle and Traffic Law 1102: No person shall fail or refuse to comply with any lawful order or direction of any police officer to regulate traffic. (Board Review 16)

Per *Wisneski v. Denning*, Civil Action No. 12-864 (W.D. Pa. Apr. 30, 2014): Force intended solely to remove an individual from a vehicle and place him under arrest is not excessive force. (Board Review 17)

§ 87(2)(b), § 87(2)(g)

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Allegation G— Det. Gerald Cucchiara spoke discourteously to § 87(2)(b) and § 87(2)(b)

Allegation H— Det. James Walsh spoke discourteously to § 87(2)(b) and § 87(2)(b)
§ 87(2)(b) testified that both Det. Cucchiara and Det. Walsh approached § 87(2)(b)'s BMW repeatedly shouting, “Don’t fucking move” and “Open the fucking door.”

Neither Det. Cucchiara nor Det. Walsh recalled saying the aforementioned to § 87(2)(b) and § 87(2)(b) nor did they recall speaking with any profanities at all. Further, Sgt. Nicoletti stated that he did not hear any profanities upon apprehension of the BMW.

Per Patrol Guide Procedure 203-09: Officers must be courteous and respectful to civilians. (Board Review 18)

§ 87(2)(g)

Allegation I—Sgt. Daniel Nicoletti spoke discourteously to § 87(2)(b)

Allegation J—Sgt. Daniel Nicoletti spoke discourteously to an individual.

§ 87(2)(b) stated that upon exiting § 87(2)(b)'s vehicle, he pleaded for Sgt. Nicoletti to spare his life, to which Sgt. Nicoletti responded, “Shut the fuck up and don’t move.” § 87(2)(b) testified that after exiting the car, he proceeded to the sidewalk, which was at most 10 feet away from § 87(2)(b)'s vehicle, where he engaged with bystanders. § 87(2)(b) stated that one of these bystanders, an elderly woman, told Sgt. Nicoletti to leave § 87(2)(b) alone, to which he told her to “Shut the fuck up and mind your own business.” § 87(2)(b) was unable to describe the woman or aware of any details conducive to identification.

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Squad: 13

Investigator:	_____	_____	_____
	Signature	Print	Date
Squad Leader:	_____	_____	_____
	Title/Signature	Print	Date
Reviewer:	_____	_____	_____
	Title/Signature	Print	Date